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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MUSE FAMILY ENTERPRISES, LTD., et al.,

Plaintiffs and Respondents,

v.

BTM FUNDING, INC., et al.,

Defendants and Appellants.

B247757

(Los Angeles County Super. Ct. No. BC445532)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard L. Fruin, Jr., Judge. Affirmed.

Saied Kashani for Defendants and Appellants.

Locke Lord, Jon L. Rewinski; and Christopher Dove for Plaintiffs and Respondents.

This appeal follows a trial in which a jury found that one of the individual defendants was the alter ego of a corporate defendant, certain real property was fraudulently transferred, and the transfer resulted in damages of $10 million to the plaintiffs. On appeal, the defendants contend: (1) there was no substantial evidence to support the jury's alter ego finding; (2) the trial court erred in instructing the jury; (3) the fraudulent transfer should not have been voided as to all transferees; (4) the damage award should be reduced; and (5) costs should not have been imposed against all defendants. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Parties

The plaintiffs consist of 20 investors in church construction projects. They are collectively referred to as the "Muse Plaintiffs." The defendants and appellants consist of BTM Funding, Inc. (BTM), David T. Smith (David), his former wife Carmen Copple Smith, also known as Carmen Copple Silva (Carmen), an individual and trustee of the Carmen Copple Silva Revocable Living Trust (trust).[1]

The Investment Projects

David was a London-based investor who was enticed to invest in church construction projects in the United States through an acquaintance, who formed BTM to handle the investments and church loans. David was the sole shareholder of BTM.

Each construction project was memorialized in an Individual Participation Agreement (agreement) between BTM and the investors. Under the agreements, investors agreed to make advance payments when BTM called for them, and BTM would then lend money to a particular church for construction under a separate agreement with the church. Upon completion of construction, the agreements required BTM to obtain a "'take-out' loan," meaning the church would obtain a new loan that would be used to repay BTM's investors, plus their profit. If BTM could not find a take-out lender for the church, BTM was obligated to pay back the investors.

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[1] We use the same references used by the parties in their briefs.

In 2007, David approached his friend, John Muse (Muse), about investing in BTM's church projects. To seal the deal, David agreed to invest $10 million in BTM as a capital asset, to invest as much as Muse did in the church projects, and to stand behind the construction loans if they failed for any reason. These representations were not written down because Muse trusted David. The Muse Plaintiffs ultimately paid more than $15 million for church construction projects, starting in February 2008.

The Residential Property

In June 2008, David used BTM to purchase a residence in Pacific Palisades, California (the property). The purchase price was $9.84 million. David transferred $8 million into BTM to fund the purchase price, and caused BTM to take out a $2 million business loan to fund the remainder. Carmen also contributed $307,500 to open escrow. David had BTM take title to the property because he wanted to hide it from his first wife during their contentious divorce proceedings. David married Carmen in October 2008 and they lived at the property, treating it as their personal residence.[2]

On November 3, 2008, David caused to be executed a quitclaim deed which transferred the property from BTM to himself. On the same day, David signed a quitclaim deed transferring the property to Carmen. No consideration was paid for any of these transfers.

The quitclaim deeds were not recorded at the time they were executed, and the property was listed as a $10 million fixed asset of BTM. In July 2009, David used the property as a BTM asset to obtain a $500,000 loan in BTM's name for his personal use. The loan application indicated there were no liens on the property, and failed to disclose that David had already executed the quitclaim deeds. David testified that in connection with this loan he considered BTM to be nothing but a "vehicle" for him and that he owned and controlled BTM. He also testified that a holding company for BTM, called BTM Servicing, LLC, "was me"; "I'm one and the same. The holding company was me."

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[2] David and Carmen divorced in October 2011 and David remarried his first wife.

Financial Problems

In 2009, several financial problems with BTM and the church projects came to light. For example, funds were not properly segregated between projects; in other projects BTM had not been paying the investors the sums owed; recordkeeping was inadequate; some churches sued BTM after construction could not be completed because so much money had gone missing; and Muse discovered that David had not followed through on his promise to invest equal amounts of money in the projects and that David's $10 million capital commitment consisted of the property.

When David was confronted with these issues, he recorded the quitclaim deeds from BTM to himself and from himself to Carmen on September 24, 2009, nearly a year after they had been executed. The next day, Carmen executed and recorded a quitclaim deed transferring the property from herself to her trust formed that day. The effect of these recordings was to render BTM insolvent. David made no effort to replenish BTM's capital account.

The Muse Plaintiffs, on the other hand, expended millions of additional dollars to hire contractors and others to complete the projects and pay for work that had already been performed.

The Lawsuit

In September 2010, the Muse Plaintiffs sued BTM, David, Carmen and her trust for breach of contract, fraud, negligent misrepresentation, and breach of fiduciary duty. They also sought to set aside the quitclaim deeds as fraudulent transfers and to declare David to be the alter ego of BTM. David chose to let BTM's default be taken.

In July 2011, the parties entered into a stipulation that BTM had breached its contracts with the Muse Plaintiffs, causing damages totaling $16,993,229, plus prejudgment interest. They also agreed that the only two issues remaining for trial were (1) whether David was the alter ego of BTM, and (2) whether the property was fraudulently transferred. In return for these stipulations, the Muse Plaintiffs dismissed their remaining claims with prejudice.

These two claims were tried to a jury in October and November 2012. In a special verdict form, the jury found that David was the alter ego of BTM, that the transfer of the property from BTM to David was fraudulent, and that David caused $10 million in damages with respect to the fraudulent transfer. An amended judgment was entered on these findings, and also ordered that the transfers from David to Carmen and from Carmen to her trust be voided and that costs be imposed against all defendants. The trial court denied the defendants' subsequent motions for judgment notwithstanding the verdict and new trial. This appeal followed.

DISCUSSION

I. Substantial Evidence Supports the Jury's Finding of Alter Ego

Initially, the Muse Plaintiffs urge us to find that appellants have forfeited their substantial evidence challenge to the jury's finding of alter ego by omitting from their opening brief the evidence that supports this finding. "A party who challenges the sufficiency of the evidence to support a finding must set forth, discuss, and analyze all the evidence on that point, both favorable and unfavorable." (*Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218.) Thus, appellants who challenge the decision of the trial court based upon the absence of substantial evidence to support it """are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence*. Unless this is done the error is deemed waived." [Citations.]'" (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) We are tempted to find that appellants have forfeited their substantial evidence challenge based on their one-sided presentation of the evidence favorable to them. But even reaching the merits, we find no basis for reversal.

A. Alter Ego Principles

"[I]t is generally stated that in order to prevail on an alter ego theory, the plaintiff must show that '(1) there is such a unity of interest that the separate personalities of the corporations no longer exist; and (2) inequitable results will follow if the corporate separateness is respected.'" (*Zoran Corp. v. Chen* (2010) 185 Cal.App.4th 799, 811.) As to factors demonstrating alter ego, the jury was instructed as follows:[3]

"In determining whether there is a unity of interest and ownership between BTM Funding, Inc. and David Smith so that the separate personality [of each] did not in reality exist, and whether there would be an unfair result if the acts of BTM Funding, Inc. are not treated as the acts of David Smith, you should consider the following factors. The following is not a complete list of the factors you may consider. No one factor is controlling and you may consider any other factor or circumstance which you believe is relevant in determining whether David Smith is the alter ego of BTM Funding, Inc. You do not need to find all factors . . . .

"(a) Whether David Smith commingled his funds and other assets with those of BTM Funding, Inc.

"(b) Whether there was a failure to segregate funds of BTM Funding, Inc. and David Smith.

"(c) Whether there was an unauthorized diversion of funds or assets of BTM Funding, Inc. to other than corporate uses.

"(d) Whether David Smith treated the assets of BTM Funding, Inc. as his own.

"(e) Whether David Smith held out that he was personally liable for the debts of BTM Funding, Inc. [¶] . . . [¶]

"(h) Whether there was failure to adequately capitalize BTM Funding, Inc.

"(i) Whether there was a total absence of corporate assets in BTM Funding, Inc.

"(j) Whether BTM Funding, Inc. was used as a mere shell, instrumentality or conduit of David Smith.

"(k) Whether there was a disregard of legal formalities and the failure to maintain arm's length relationships between BTM Funding, Inc. and David Smith.

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[3] Because the issue of alter ego is an equitable one that is usually decided by the trial court, this was a specially drafted instruction by the Muse Plaintiffs. Courts have identified additional factors based on the circumstances of each case. (See *Zoran Corp. v. Chen, supra,* 185 Cal.App.4th at pp. 811–812.)

"(l) Whether there was a diversion of assets from BTM Funding, Inc. to David Smith or others, to the detriment of creditors."

B. Evidence Presented

Here, the jury was presented with evidence constituting these factors. For example, the evidence showed that David used BTM to purchase the property, in which he and Carmen lived and treated as their personal residence. But the property was listed as an asset of BTM, despite the fact that David and Carmen did not pay BTM rent. The $2 million loan that David had BTM take out to help fund the purchase price of the property was listed as a debt of BTM, yet David took the mortgage interest tax deduction for himself. David also caused BTM to borrow $500,000, then used the money for his personal purposes. Moreover, at the time when capital was needed the most to protect BTM's investors, David recorded the quitclaim deed transferring the property to himself, leaving BTM insolvent to the detriment of creditors.

David used BTM's bank accounts for his personal purposes. He wrote checks from the accounts to himself and even wrote a $30,000 check to his personal divorce attorney. He also used BTM's bank accounts to funnel his money into the United States.

David held himself out as a personal guarantor for the debts of BTM. Several witnesses testified that he promised to make investors whole for any losses on the church construction projects.

The jury heard testimony that BTM never followed corporate formalities, such as written consents, share registers, meetings of directors, or paying dividends. Over time other formalities slackened, including the absence of corporate minutes. David testified: "I didn't have to document it. It was only dealing with me. Who was I going to document it to?"

David testified that he completely owned and controlled BTM. BTM was simply a "vehicle" for his use, and whatever funds flowed into BTM flowed back out to him.

BTM had no employees and no physical office.

In sum, substantial evidence supports the jury's finding that David was the alter ego of BTM.

II. No Instructional Error

Appellants contend that the trial court erred by not instructing the jury that (1) a heightened standard exists for finding alter ego in contract cases and (2) there can be no "double counting" for fraudulent transfers.

"""The propriety of jury instructions is a question of law that we review de novo. [Citation.]" [Citation.] If an instruction is found to be erroneous, reversal is required only when "it appears probable that the improper instruction misled the jury and affected [its] verdict. [Citation.]"'" (*Spriesterbach v. Holland* (2013) 215 Cal.App.4th 255, 263.)

There is no merit to appellants' contention of instructional error. First, contrary to appellants' position, there is no requirement in a contract case, as opposed to a tort case, that a jury be instructed that the actions taken by the controlling individual with respect to the controlled company must have "harmed" the plaintiffs or exposed them to "*unexpected* risk." Appellants rely on a Tenth Circuit case, *Cascade Energy & Metal Corp. v. Banks* (10th Cir. 1990) 896 F.2d 1557 (*Cascade*), for the proposition that a higher alter ego standard applies in contract litigation. But this case focused on the doctrine of outside "reverse piercing" (by which a corporation is held liable for a shareholder's debt), which is not the issue here. (*Id.* at p. 1575; *Postal Instant Press, Inc. v. Kaswa Corp.* (2008) 162 Cal.App.4th 1510, 1524 [outside reverse piercing and alter ego theories are different].) Moreover, the *Cascade* court was analyzing Utah law. Although the court noted that "California's standard for piercing the corporate veil does not appear to be materially different from Utah's," neither of the two California cases it cited for this proposition imposed an elevated standard. (*Cascade, supra,* at p. 1575, fn. 18 [citing *Automotriz Etc. De California v. Resnick* (1957) 47 Cal.2d 792 and *Institute of Veterinary Pathology, Inc. v. California Health Laboratories, Inc.* (1981) 116 Cal.App.3d 111, 119].) Simply put, California courts have routinely applied basic alter ego doctrine in contract cases without requiring the elevated standard advocated by appellants. (See, e.g., *Automotriz Etc. De California v. Resnick, supra,* at p. 792; *Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538.)

Appellants' second assignment of instructional error—that the jury should have been instructed not to consider the property in determining whether David diverted corporate money to his personal use—is likewise without merit. Appellants argue that allowing the jury to consider David's fraudulent transfer of the property in its alter ego determination resulted in "double-counting" and "violates the rule that alter ego should not be exploited as an alternative to normal creditor remedies such as UFTA [Uniform Fraudulent Transfer Act, Civil Code section 3439 et seq.]."

But alter ego does not result in a double recovery. As explained in *Hennessey's Tavern, Inc. v. American Air Filter Co.* (1988) 204 Cal.App.3d 1351, 1358–1359: "An alter ego defendant has no separate primary liability to the plaintiff. Rather, plaintiff's claim against the alter ego defendant is identical with that claimed by plaintiff against the already-named defendant. [¶] A claim against a defendant, based on the alter ego theory, is not itself a claim for substantive relief, e.g., breach of contract or to set aside a fraudulent conveyance, but rather, procedural, i.e., to disregard the corporate entity as a distinct defendant and to hold the alter ego individuals liable on the obligations of the corporation where the corporate form is being used by the individuals to escape personal liability, sanction a fraud, or promote injustice."

Additionally, there is no legal requirement that a plaintiff exhaust other remedies before seeking to prove traditional alter ego. Appellants' reliance on *Postal Instant Press v. Kaswa Corp., supra,* 162 Cal.App.4th 1510 is misplaced. As noted above, that court was addressing outside reverse piercing, and courts have developed a requirement that before seeking to hold a corporation liable for a shareholder's debts, "'the availability of alternative, adequate remedies must be considered by the trial court.'" (*Id.* at p. 1524.) No requirement exists under the circumstances here. Indeed, the appropriation of corporate assets has been expressly described as a factor in determining whether an alter ego relationship exists. (*Zoran Corp. v. Chan, supra,* 185 Cal.App.4th at p. 811.)

III. No Error In Voidance of the Fraudulent Transfers

Appellants contend that the portion of the judgment voiding the transfers of the property from David to Carmen and from Carmen to her trust must be reversed. They point out that in the special verdict form, the jury was asked to find only if BTM fraudulently transferred the property to David, without addressing the subsequent transfers, and that the jury specifically found that Carmen and her trust caused zero damages to the Muse Plaintiffs from the transfer of the property.

Appellants' contention is not well taken. Appellants rely on Civil Code section 3439.08, subdivision (a), which is part of the UFTA and which provides: "A transfer or an obligation is not voidable under paragraph (1) of subdivision (a) of Section 3439.04, against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee." (Civ. Code, § 3439.08, subd. (a).)

Appellants read this statute to mean that all subsequent transferees are shielded from voidance actions, not merely those transferees whose title can be traced back to a bona fide purchaser. This reading, however, would allow a defrauder to thwart creditors by conveying the property twice instead of once. Thus, courts have rejected this interpretation. (See e.g., *Sobel Bldg. Dev. Partners v. Broach* (*In re Sexton*) (Bankr. N.D. Cal. 1994) 166 B.R. 421, 427 ["[t]he Court understands section 3439.08(a) to provide a defense to a subsequent transferee only if its transferor (or someone earlier in the transfer chain) received its transfer in good faith and for reasonably equivalent value"]; *Town of Nottingham v. Bonser* (2001) 146 N.H. 418, 427 ["to enjoy the protected status of 'subsequent transferee,' one must obtain the property from an owner who has paid fair consideration without knowledge of any fraud," citing New Hampshire's identical version of the UFTA.) Indeed, this provision of the UFTA merely modernizes the language of the former Uniform Fraudulent Conveyance Act (UFCA), Civil Code section 3429.09, which stated: "(a) Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser or encumbrancer for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser or encumbrancer, . . ." (*Flowers & Sons Development Corp. v. Municipal Court* (1978) 86 Cal.App.3d 818, 824.)[4]

In any event, Carmen and her trust received the property through quitclaim deeds, not warranty deeds. "A quitclaim deed, however, 'transfers only whatever interest the grantors possess at the time of the conveyance.'" (*In re Marriage of Gioia* (2004) 119 Cal.App.4th 272, 280.) Thus, Carmen received nothing because the fraudulent nature of the transfer to David voided all of her grantor's interests in the property.

Appellants also argue that because the jury found that Carmen and her trust did not cause the Muse Plaintiffs any damages with respect to the fraudulent transfer, "[i]t is entirely inconsistent with the jury verdict[] and equity" to order that the trust return the property to BTM, and that the Muse Plaintiffs' remedy is the $10 million money judgment against David. But the voidance statute only prevents voidance against "a person who took in good faith and for a reasonably equivalent value." (Civ. Code, § 3439.08, subd. (a).) Even putting aside the issue of good faith, the evidence showed that Carmen and her trust never paid any value for the transfer of the $10 million property. Accordingly, the trial court properly voided the transfer to David and to all subsequent transferees.

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4 The Muse Plaintiffs point out that the National Conference of Commissioners on Uniform State Laws explained that the purpose of the UFTA was the same as the former UFCA, but that the revision was necessary because "the terminology of the UFCA had become considerably archaic." (U. Law. Com., Fraudulent Transfer Act Summary <http://www.uniformlaws.org/ActSummary.aspx?title=Fraudulent+Act> [as of Sept. 30, 2014].)

IV. Appellants Did Not Demonstrate on Appeal that the $10 Million Damage Award Against David Should be Reduced

Appellants contend that we should reduce the jury's damage award on the fraudulent transfer claim against David from $10 million to $7.5 million, to reflect $2.5 million in liens that were attached to the property at the time it was transferred from BTM to David in September 2009.

Appellants are correct that bona fide liens will reduce the value of the asset transferred. Civil Code section 3439.08, subdivision (b) provides that when a transfer is voidable, "the creditor may recover judgment for the value of the asset transferred." The UFTA defines "asset" as the property of debtor, but does not include "[p]roperty to the extent it is encumbered by a valid lien." (Civ. Code, § 3439.01, subd. (a)(1).)

The problem with appellants' contention is that it is unsupported. Appellants simply assert—without any citation to the record—that "[i]t is undisputed that as of September 2009, the property was subject to two bona fide liens in favor of America's Christian Credit Union in the total amount of $2.5 million. Both loans were taken out when the property was in record title of BTM Funding, Inc. The legitimacy of the $2.5 million loans was never questioned." But the Muse Plaintiffs claim in their respondents' brief that that this assertion is "[f]alse" because they did question the amount of the liens still existing at the time of transfer. The Muse Plaintiffs state: "The evidence shows that loans totaling $2.5 million had been taken out on the property in the past, but there was *no evidence* of the amount of the loans at the time the fraudulent deed was recorded in September 2009."

Appellants argue that it was the Muse Plaintiffs' burden at trial to prove that the property was *not* encumbered by a valid lien. But even if this were true, appellants cannot shift their burden on appeal. "'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564;

Hernandez v. California Hospital Medical Center (2000) 78 Cal.App.4th 498, 502.) Because appellants have failed to meet their burden on appeal of showing error by the trial court, we refuse to reduce the $10 million damage award against David.

V. No Abuse of Discretion in Awarding Costs Against Carmen and Her Trust

Appellants' final contention is that the trial court abused its discretion in awarding costs jointly and severally against Carmen and her trust, along with BTM and David. Again, this contention is not well taken.

Code of Civil Procedure section 1032, subdivision (a)(4) provides in part: "When any party recovers other than monetary relief and in situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under Section 1034." (See also *Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1339.)

Here, the Muse Plaintiffs can be said to have "prevailed" against Carmen and her trust by overcoming their argument that the UFTA shields every "subsequent transferee" from a voidance action. Thus, we find no abuse of discretion by the trial court in awarding costs against Carmen and her trust.

DISPOSITION

The judgment is affirmed. The Muse Plaintiffs are entitled to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

____________________________, J.
ASHMANN-GERST

We concur:

_______________________________, P. J.
BOREN

______________________________, J.
CHAVEZ